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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the application of:

MERRIL et al.

Serial Number: 08/879,139

Filed: June 19, 1997



Group Art Unit: 1648

Examiner: D. Wortman

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TECH CENTER 1600/2900

For: ANTIBACTERIAL THERAPY WITH BACTERIOPHAGE GENOTYPICALLY
MODIFIED TO DELAY INACTIVATION BY THE HOST DEFENSE SYSTEM

PETITION TO WITHDRAW HOLDING OF ABANDONMENT

Assistant Commissioner for Patents
Washington, D.C. 20231

June 22, 1999

Sir:

On June 15, 1999, the examiner in this case, Donna C. Wortman, Ph.D., faxed a copy of the front page of an Office Action sent by the U.S. Patent and Trademark Office to the firm of Nikaido, Marmelstein, Murray & Oram LLP (referred to herein as "the firm") and indicated that a Notice of Abandonment was being sent out for failure to respond to the Office Action.

The facsimile transmission indicates that the Office Action was mailed from the USPTO on October 2, 1998. However, no such Office Action was ever received by the firm. Attached are Declarations by Ms. Debbie L. Orrison (the docket clerk for the firm on October 2, 1998), Ms. Monica Chin Kitts (the attorney responsible for the above application), Ms. Lorraine C. Barlow (the secretary for Ms. Kitts) and Mr. George E. Oram, Jr. (a partner in the firm), detailing the mail-handling and docketing procedures for the firm, and detailing the reasons why it is apparent that no Office Action for the above application

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was ever received by the firm.

It is noted that the mailing address of the firm was correctly listed as the correspondence address on the transmittal sheet filed with this application and on Office Actions mailed from the USPTO on April 6, 1998 and February 11, 1998. The effectiveness of the correspondence address is demonstrated by the fact that the April 6, 1998 and February 11, 1998 Office Actions were each received by the firm two days after being mailed from the USPTO.

It is also noted that any presumption that mail matter properly addressed, stamped and deposited in an appropriate receptacle is duly delivered is predicated on the fixed methods and systematic operation of the Postal Service, and that such a presumption can be rebutted. See Legille v. Dann, 544 F.2d 1 (CAFC 1976).

The effectiveness of the correspondence address has been demonstrated. The applicants' contention of non-receipt of the Office Action allegedly mailed October 2, 1998 is supported in the enclosed Declarations. Thus, it is respectfully submitted that the failure of the October 2, 1998 Office Action to reach the firm was not the fault of the firm in any way.

It is respectfully requested that the Office Action be remailed to the firm and that any holding of abandonment be withdrawn. See MPEP §711.02 and Delgar Inc. v. Schuyler, Commr. Pats, 172 USPQ 513 (D.D.C. 1971).

Any fees associated with this communication should be waived since the evidence submitted herewith shows that the applicants are in no way at fault for not responding to the October 2, 1998 Office Action.

Should withdrawal from abandoned status not be granted immediately, this Petition

should be considered to be a Petition to the Commissioner under 37 C.F.R. 1.181 - 1.183, including a petition that all fees in connection therewith be waived because it is clear that the applicants are not at fault in this matter.

Should any such petition Under 37 C.F.R. 1.181 - 1.183 not be immediately granted, this Request should be considered to be a Petition under (37 C.F.R. 1.137(a) or 1.137(b)), including a petition that all fees in connection therewith be waived because it is clear that the applicants are not at fault in this matter.

The Commissioner is hereby authorized to charge any fees associated with this communication to Deposit Account No. 14-1060. A duplicate copy of this request is attached.

Should the appropriate official of the U.S. Patent and Trademark Office have any questions, that official is requested to telephone the applicants' undersigned attorney.

Respectfully submitted,

NIKAIDO, MARMELESTEIN, MURRAY & ORAM LLP


Monica Chin Kitts
Attorney for Applicant
Registration No. 36,105

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Enclosures:

facsimile copy of cover page of Office Action
Declaration by Debbie L. Orrison
Declaration by Monica Chin Kitts
Declaration by Lorraine C. Barlow
Declaration by George E. Oram, Jr.